

Manan (Migration) [2019] AATA 3262 (1 April 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Jay Manan

CASE NUMBER: 1719012

HOME AFFAIRS REFERENCE(S): BCC2015/2922783

MEMBER: Michael Cooke

DATE: 1 April 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A
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- Statement made on 01 April 2019 at 12:43pm

1. **CATCHWORDS**

2. *MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner) – genuine and continuing relationship – evidence submitted – decision under review remitted*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), Schedule 2 cls 820.211, 820.221, rr 1.09A(3), 2.03A

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 2 October 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the applicant did not meet the definition of de facto partner.
8. The applicant was represented in relation to the review by his registered migration agent.
9. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in the present case is whether the applicant is in a genuine and continuing de facto partnership.
11. **SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)**

Whether the parties are in a spouse or de facto relationship

12. Clause.820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

13. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
14. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
- 15.

16. Findings and reasons about each matter in r.1.09A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under r.1.09A(2),

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
17. The Tribunal is satisfied from the submitted additional information that the financial aspects of the relationship indicate that the applicant and sponsor are in a in a financial de facto relationship.
- Nature of the household – including any joint responsibility for care and support of children; parties’ living arrangements; and any sharing of housework.
18. The Tribunal is satisfied from the submitted additional information that the household aspects of the relationship indicate that the parties are in a in a de facto household relationship.
- Social aspects of the relationship – including whether parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
19. The parties are not heavy socialisers but have provided additional information indicating a de facto partner type social relationship with friends and family members which has been recognized as such
- Nature of persons’ commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
20. It is obvious from the additional information provided by the applicant and sponsor that they share a deep mutual commitment together and see their relationship as long- term.
- Any other circumstances of the relationship.
21. The Tribunal is satisfied (having had he benefit of copious additional information) that the de facto relationship between the parties is sincere and long-standing.
- Whether the parties are related by family.
22. The parties are not so related.
23. The Tribunal has considered the full circumstances of the parties’ relationship and makes the following findings on these matters findings against s.5CB(2)(a)-(c). The parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and they live together or not separately and apart on a permanent basis and pursuant to s.5CB(2)(d) they are not related by family.
24. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
25. The Tribunal is further satisfied that the applicant was sponsored by his sponsoring partner at time of application and continues to be so sponsored at time of application meeting cl.

820.211(2)(c). He was also a substantive visa holder at time of application and further the Schedule 3 requirements in cl.820.211(2)(d).

26. Therefore, the applicant meets cl.820.211(2)(a) and cl.820.221.

Are the additional criteria for a de facto relationship met?

27. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
28. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
29. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. Accordingly, the Tribunal is satisfied from the cumulative evidence submitted that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
30. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

32. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A
 -
 - Michael Cooke
 - Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).